Hong Leong Finance Bhd v Thamilcheleven s/o Palinesamy & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12–5–93
ABDUL MALIK ISHAK J
30 OCTOBER 1995

Hire-Purchase *— Hire-purchase agreement — Guarantor — Hirer entered agreement with finance company to hire-purchase car — Car dealer acted as guarantor of agreement — Whether dealer of same goods as comprised in agreement could be guarantor — Whether contract of guarantee contravened Hire-Purchase Act 1967 — Whether constituted recourse agreement — Hire-Purchase Act 1967 s 2(1)*

The first respondent, T entered into a hire-purchase agreement with Hong Leong Finance Bhd ('the appellant') for the purchase of a car, whereby T agreed to pay a monthly instalment of RM1,905 for a period of 24 months. To strengthen the position of the appellant, the second respondent (the dealer who sold the car to the T) signed an agreement to guarantee the hire-purchase agreement entered into between T and the appellant. T later defaulted in paying the monthly instalments, and the appellant filed an action in the sessions court against both T and the second respondent. Judgment was obtained against T. The appellant took possession of the car and sold it. The appellant proceeded to claim against the second respondent for the outstanding loss. The sessions court dismissed the appellant's action. The appellant appealed to the High Court contending, inter alia, that the agreement entered into between the appellant and the second respondent was in the nature of a recourse agreement whereby the second respondent guaranteed T's obligations to the appellant for any loss that the appellant might incur.

Held, dismissing the appeal:

(1) Upon a plain reading of the definition of 'contract of guarantee' appearing in s 2(1) of the Act, it is clear that it excludes dealers or other persons engaged at the time of giving the guarantee in the trade or business of selling goods of the same nature or description as the goods comprised in the hire-purchase agreement. Therefore, the second respondent would not be held responsible to the appellant under the Act (see p 356G); *Guthrie & Anor v Motor Credits Ltd* (1963) 37 ALJR 167 followed.

(2) The expression 'recourse' is used loosely to indicate the right of a finance company to look to the dealer for payment of any loss suffered on transactions put through by him. A recourse provision may take the form either of an obligation on the dealer's part to repurchase the goods from the finance company in stated events, or an agreement by the dealer to indemnify the finance company against loss in case of default on the hirer's part, or the finance

company may be given the option either to require the dealer to repurchase the goods or to give an indemnity (see pp 357I and 358A).

(3) A contract of guarantee is the promise of one person to be answerable for the debt or obligations of another if that other defaults. A contract of indemnity is a contract by one party to keep the other harmless against loss and is not dependent on the continuing liability of the principal debtor (see pp 360 and 361).

(4) However, in the final analysis, it is the court that will be called upon to decide whether the contract is one of indemnity or that of a contract of guarantee. Where the words 'guarantee' or 'indemnity' appear in the agreement, these are indications of the intentions of the parties, especially so if the expressions are repeated a number of times or if they appear in the headings of the agreements. It follows that the agreement in the present case which was in such nature was a guarantee, not an indemnity (see pp 361D and 363C); *Heald v O'Connor* [1971] 2 All ER 1105; [1971] 1 WLR 497 and *Goulston Discount Ltd v Clark* followed.

(5) The contract of guarantee in this case could not be enforced against the second respondent dealer for the simple reason that it contravened the Act. Even if there had been ambiguity in the terms of the contract of guarantee, applying the principle of contra proferentum, the contract should be construed in favour of the guarantor (see pp 363E and 364A); *Midland Counties Motor Finance Co Ltd v Slade* [1951] 1 KB 346 followed.

[Bahasa Malaysia summary

Penentang pertama, T, telah mengikat satu perjanjian sewa beli dengan sebuah Hong Leong Finace Bhd ('perayu') untuk pembelian sebuah kereta di mana T bersetuju membayar ansuran bulanan sebanyak RM1,905 untuk tempoh 24 bulan. Untuk mengukuhkan kedudukan perayu, penentang kedua (peniaga yang menjual kereta itu kepada T) telah menandatangani satu perjanjian untuk menggerenti perjanjian sewa beli yang diikat di antara T dan perayu. T gagal membayar ansuran bulanan dan perayu memfailkan satu tindakan di mahkamah sesyen terhadap kedua T dan penentang kedua. Penghakiman telah diperolehi terhadap T. Perayu mengambil milikan kereta itu dan menjualnya. Perayu seterusnya menuntut terhadap penentang kedua untuk kerugian yang masih belum dibayar. Mahkamah sesyen menolak tindakan perayu. Perayu merayu ke Mahkamah Tinggi. Perayu menghujah, antara lain, bahawa perjanjian yang diikat di antara perayu dan penentang kedua adalah bersifat perjanjian 'recourse' di mana penentang kedua menggerenti obligasi T kepada perayu untuk sebarang kerugian yang mungkin dialami oleh perayu.

Diputuskan, menolak rayuan itu:

(1) Adalah jelas daripada pembacaan terus takrifan 'kontrak gerenti' yang terdapat dalam s 2(1) of Akta bahawa ia tidak merangkumi peniaga atau orang lain yang terlibat semasa pemberian gerenti dalam perdagangan atau perniagaan menjual barangan yang mempunyai sifat atau perincian yang sama seperti barangan yang terkandung di dalam perjanjian jual beli yang berkenaan. Oleh itu, penentang kedua tidak bertanggung jawab kepada perayu di bawah Akta tersebut (lihat ms 356G); *Guthrie & Anor v Motor Credits Ltd* (1963) 37 ALJR 167 diikut.

(2) Ungkapan 'recourse' digunakan secara longgar untuk menunjukkan hak suatu syarikat kewangan untuk bergantung kepada peniaga untuk pembayaran sebarang kerugian yang dialaminya atas urus niaga yang disalurkan olehnya. Suatu peruntukan recourse boleh mengambil bentuk sama ada suatu obligasi pada peniaga untuk membeli balik barangan yang terlibat daripada syarikat kewangan dalam keadaan yang dinyatakan, atau satu perjanjian oleh peniaga untuk menanggung rugi syarikat kewangan terhadap kerugian jika berlakunya keingkaran penyewa, ataupun syarikat kewangan boleh diberikan opsyen sama ada menghendaki peniaga membeli balik barangan tersebut atau memberikan tanggung rugi (see pp 357I and 358A)..

(3) Kontrak gerenti merupakan janji seseorang untuk bertanggungjawab terhadap hutang atau obligasi seorang yang lain jika orang yang lain itu ingkar. Kontrak tanggung rugi pula merupakan kontrak oleh satu pihak untuk menentukan pihak yang lain tidak dimudaratkan oleh kerugian dan ianya tidak bergantung pada tanggungan berterusan penghutang prinsipal (lihat ms 360 dan 361).

(4) Walau bagaimanapun, dalam analisa muktamad, mahkamahlah yang akan menentukan sama ada kontrak yang terlibat merupakan suatu kontrak tanggung rugi atau kontrak gerenti. Perkataan-perkataan 'gerenti' atau 'tanggung rugi' yang muncul dalam sesuatu perjanjian itu menunjukkan niat pihak-pihak, lebih-lebih lagi jika ungkapan tersebut diulang beberapa kali atau jika ia kelihatan pada kepala perjanjian itu. Maka, perjanjian dalam kes ini yang bersifat sedemikian merupakan suatu gerenti, bukan suatu tanggung rugi (lihat ms 361D and 363C); *Heald v O'Connor* [1971] 2 All ER 1105; [1971] 1 WLR 497 and *Goulston Discount Ltd v Clark* followed.

(5) Kontrak gerenti dalam kes ini tidak boleh dikuatkuasakan terhadap peniaga penentang kedua atas sebab yang mudah bahawa ia bercanggahan dengan Akta tersebut. Walaupun terdapat ketaksaan dalam terma kontrak gerenti, dengan pemakaian prinsip contra proferentum, kontrak tersebut harus ditafsirkan supaya keputusannya memihak terhadap penggerenti (lihat ms 363E and 364A); *Midland Counties Motor Finance Co Ltd v Slade* [1951] 1 KB 346 followed.]

[*Editorial note*: The appellant has applied for leave to appeal to the Court of Appeal vide Civil Appeal No J–08–620 of 95.]

Notes

For cases on hire-purchase agreements, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2332–2357.

Cases referred to

AA Davison Pty Ltd v Beabrook (1931) 37 ALR 156
Bigeni v Drummond (1953) 71 WN (NSW) 242
Bowmaker (Commercial) Ltd v Smith [1965] 1 WLR 855; [1965] 2 All ER 304
Daly & Anor v Roth (1956) WN (NSW) 270
Duncombe v Australia ad New Zealand Bank Ltd (1970) Qd R 202
Eastern Counties Building Society v Russell [1947] 1 All ER 500
General Surety and Guarantee Co Ltd v Francis Parker (1977) 6 BLR 18
Glyn v Hartel (1818) 8 Taunt 208; 129 ER 363
Goulston Discount Co Ltd v Clark [1967] 2 QB 493; [1966] 3 WLR 1280; [1967] 1 All ER 61
Guthrie & Anor v Motor Credits Ltd (1963) 37 ALJR 167
Harburg India Rubber Comb Co v Martin [1902] 1 KB 778
Heald v O'Connor [1971] 1 WLR 497; [1971] 2 All ER 1105
Hodge v The King (1907) 5 CLR 373
International Leasing Corp (Vic) Ltd v Aiken [1967] 2 NSWR 427
James v Mason (1892) 13 LR (NSW) 157
Jowitt v Callaghan (1938) 38 SR (NSW) 512
Mason v Pritchard (1810) 12 East 228; 104 ER 89
Mayer v Isaac (1840) 6 M & W 605; 151 ER 554
Mercantile Credits Ltd v Harry [1969] 2 NSWR 248
Mercantile Credits v Buckeridge [1980] WAR 1
Midland Counties Motor Finance Co Ltd v Slade [1951] 1 KB 346; [1950] 2 All ER 821
Morin v Hammond Lumber Co (1923) 1 DLR 519
Moschi v LEP Air Services Ltd [1973] AC 331; [1972] 2 All ER 393
Parker v Bayly [1927] GLR 265
Samuel v Newbold [1986] AC 461
Scholefield Goodman and Sons Ltd v Gange (Supreme Court NSW, 4 December 1979) (unreported)
Triaca v Summariew Pte Ltd [1971] VR 347
Yeoman Credit Ltd v Latter [1961] 1 WLR 828; [1961] 2 All ER 294

Legislation referred to

Hire-Purchase Act 1967 s 2(1)
Hire-Purchase Act 1960–1965 [Aust]

Amy Law Siew Tin (*Abdul Raman Saad & Associates*) for the appellant.
Liew Yoon Sam (*K Sila Dass & Partners*) for the second respondent.

Cur Adv Vult

Abdul Malik Ishak J: This was an appeal from the decision of the learned judge of the sessions court, Johore Bahru, who had dismissed the action against the second respondent with costs. The brief facts may be stated as follows.

A customer by the name of Thamilchelevan s/o Palinesamy ('Thamil'), the first respondent, was desirous of purchasing a 1981 Mercedes Benz bearing registration number JAK 9749 at a price of RM65,000. Thamil only had with him RM24,000 in cash and he needed the balance to effect the purchase of the Mercedes Benz. For this purpose, Thamil signed a hire-purchase agreement dated 26 June 1991 with Hong Leong Finance Bhd, the appellant, where Thamil agreed to pay a monthly instalment of RM1,905 per month for a period of 24 months. The first instalment was scheduled to begin on 26 July 1991, and the appellant charged an interest of 8% pa for that hire purchase. To strengthen the position of the appellant, the dealer by the name of Ibrahim bin Mohd Yusof ('the second respondent'), signed a guarantee of the hire-purchase agreement entered into between Thamil and the appellant on the same day, namely, 26 June 1991.

Thamil defaulted in paying the monthly instalment. The appellant filed the action in the sessions court, Johore Bahru against both Thamil and the dealer and obtained judgment against Thamil sometime in March 1992. On 18 September 1992, the appellant retook possession of the Mercedes Benz and sold it for RM29,000, leaving an outstanding loss of RM19,348.77. To recoup that loss, the appellant proceeded hard against the dealer.

I am conscious that hire-purchase agreements now occupy a prime position of major importance in commercial life. They have grown by leaps and bounds that they have become more like money lending transactions — 'a class of contracts which peculiarly lend themselves to an abuse of power' (*Samuel v Newbold* [1906] AC 461 at p 467; *Bigeni v Drummond* (1953) 71 WN (NSW) 242). But as Isaacs J said in *Hodge v The King* (1907) 5 CLR 373 at p 385:

> It is the office of the court having ascertained the mischief and defect for which the law did not otherwise provide, and the remedy which Parliament hath resolved and appointed, and the true reason of the remedy, to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief.

It is with these principles in mind that I proceeded to hear the present appeal.

Must the dealer be held responsible under the Hire-Purchase Act 1967 ('the Act') to the appellant? Section 2(1) of the Act needs to be referred to and there, a 'contract of guarantee' is defined to mean:

> in relation to any hire-purchase agreement, a contract made at the request, expressed or implied, of the hirer to guarantee the performance of the

> hirer's obligations under the hire-purchase agreement, *but does not include the dealer or a person engaged at the time of giving of the guarantee in the trade or business of selling goods of the same nature or description as the goods comprised in the agreement,* and the expression 'guarantor' shall be construed accordingly. (the emphasis is mine and its significance will be seen in the later part of this judgment).

A book entitled *Malaysian Law on Hire-Purchase* edited by Associate Prof Salleh Buang, Hamid Ibrahim, Nasser Hamid and Maimoonah Hamid contains a passage (at p 11) that merits reproduction. It is worded as follows:

> The Act [referring to the Hire-Purchase Act 1967] also does not apply where the customer is 'a person who is engaged in the same trade or business of selling goods of the same nature or description as the goods comprised in the agreement'. What this means is that the Act applies to 'consumers' and does not apply to dealers. Thus, if Ahmad, who is a dealer in motor vehicles, obtains a Proton Saga from a supplier under an agreement to pay for the car by instalments with the intention of selling the car to a customer, such an agreement is not deemed a hire-purchase agreement within the meaning of the Act.

As I see it, generally speaking a guarantee given by a dealer to a finance company by which the dealer guarantees to the finance company the performance by an intending purchaser of his hire-purchase agreement, is not within the ambit of the Act (see *Daly & Anor v Roth* (1956) 73 WN (NSW) 270 for comparison). His Lordship Windeyer J, in *Guthrie & Anor v Motor Credits Ltd* (1963) 37 ALJR 167 at p 169, was of the view that the directors, being in the control of the company's affairs, could be viewed and seen as being engaged in the trade or business of selling goods of the same description as the goods comprised in the hire-purchase agreement so as to put themselves outside the definition of the word 'guarantor' in the Australian Hire-Purchase Act 1960–1965. On the authority of *Guthrie & Anor v Motor Credits Ltd*, and upon a plain reading of the definition of 'contract of guarantee' appearing in s 2(1) of the Act, it is my judgment that it excludes dealers or other persons engaged at the time of giving the guarantee in the trade or business of selling goods of the same nature or description as the goods comprised in the hire-purchase agreement. I am acutely aware that the word 'guarantor' is not defined in the Act unlike the Australian counterpart where a 'guarantor' is defined to mean 'a person who has guaranteed the performance by a hirer of all or any of his obligations under a hire-purchase agreement *but does not include the dealer or a person engaged, at the time of the giving of a guarantee, in the trade or business of selling goods of the same nature or description as the goods comprised in the agreement.*' It can be seen that the emphasized portions of the definition of the word 'guarantor' in the Australian Hire-Purchase Act 1960–1965 is word for word with the emphasized portions of the definition of the words 'contract of guarantee' appearing in s 2(1) of the Act and because of this similarity, the case of *Guthrie & Anor v Motor Credits Ltd* can be vigorously applied to the present appeal.

Now, reverting back to the question posed, the answer would be in the negative in that the dealer here would not be responsible to the appellant under the Act, and I so ruled accordingly.

Next, it was argued that the contractual liability of the dealer existed quite independently from that of the Act, and it was argued that this aspect needed to be looked into. It was said that there was a contract between the dealer and the appellant whereby the dealer guaranteed Thamil's obligations to the appellant for any loss that the appellant may have incurred. This was said to be the recourse agreement in existence between the dealer and the appellant. It is undeniable that there is no local authority on the subject matter of a recourse agreement, and in the course of charting a new cause of action, I must tread cautiously lest I run foul of the law. What is the meaning to be attached to the term 'recourse agreement'? 22 *Halsbury's Laws* (4th Ed) para 236 gives an inkling of what that term means. It is as follows:

> Into the other category fall the arrangements, common where the main transaction is financed by a finance company purchasing a dealer's interest in a chattel, whereby the dealer enters into an agreement with the finance company to guarantee the main agreement. Such an arrangement is known as a recourse agreement, and may take the form either of an arrangement to reimburse the finance company for any loss occasioned by the hirer or buyer defaulting, or an agreement to repurchase the relevant chattel in certain circumstances, such as the default of the hirer or buyer.

Prof R M Goode in his book *Commercial Law* (Penguin ed) at p 882 said, inter alia:

> ... the finance house may have an arrangement with the dealer by which the latter guarantees payment by all the debtors he has introduced. Such a guarantee is fixed solely as the result of negotiation between finance house and dealer, and the debtors concerned are never consulted.

Chitty on Contracts (24th Ed) para 3230 at p 3228, elaborates further as to the meaning of recourse agreement in the following terms:

> Many modern hire-purchase transactions are conducted under the 'direct collection' system of finance, in which the dealer does not himself let goods to the hirer, but sells them to a finance company which then lets them to the hirer. In order to safeguard themselves, finance companies sometimes require the dealer to enter into an agreement under which the dealer becomes a surety for the due performance of his obligations by the hirer. This agreement is known generally as a 'recourse agreement.' The dealer may, at the same time, be appointed the company's agent to collect the hire-purchase instalments or to take possession of the goods on behalf of the company in the event of breach by the hirer. Recourse agreements normally take the form of a guarantee of the hirer's obligations under the hire purchase agreement or of an indemnity against loss caused to the finance company by the hirer's default, and the dealer's liability will depend upon which form of agreement is entered into.

It is my judgment, that the expression 'recourse' is used loosely to indicate the right of a finance company to look to the dealer for payment of any loss suffered on transactions put through by him. A recourse provision or

undertaking may take the form either of an obligation on the dealer's part to repurchase the goods from the finance company in stated events, or an agreement by the dealer to indemnify the finance company against loss in case of default on the hirer's part, or the finance company may be given the option either to require the dealer to repurchase the goods or to give an indemnity.

Broadly speaking, there are three approaches to adopt in the construction of contracts of guarantee. The first approach which is now considered to be an old approach is that in cases of ambiguity, the guarantee should be construed strictly against the guarantor (see *James v Mason* (1892) 13 LR (NSW) 157 at 162 per Windeyer J; *AA Davison Pty Ltd v Seabrook* (1931) 37 ALR 156; *Mayer v Isaac* (1840) 6 M & W 605, 151 ER 554; *Mason v Pritchard* (1810) 12 East 227, 104 ER 89; and 20 *Halsbury's Laws* (4th Ed, 1978) para 146). The second approach is that in cases of ambiguity the guarantee should be construed in favour of the guarantor. This is reflected in *Eastern Counties Building Society v Russell* [1974] 1 All ER 500 at 503 (together with the cases cited therein); *Parker v Bayly* (1927) GLR 265 at 267; *Mercantile Credits Ltd v Harry* (1969) 2 NSWR 248 at 249; *General Surety and Guarantee Co Ltd v Francis Parker* (1977) 6 Build LR 18 at 21; *Glyn v Hertel* (1818) 8 Taunt 208, 129 ER 363; *Duncombe v Australia & New Zealand Bank Ltd* (1970) Qd R 202 at 207; *Mercantile Credits Ltd v Buckeridge* [1980] WAR 1 at 7; and finally in *Triaca v Summaries Pte Ltd* (1971) VR 347 at 351. It is interesting to note that Sheppard J adopted this approach in *Scholefield Goodman and Sons Ltd v Gange* (Supreme Court of New South Wales, 4 December 1979) (unreported), and there, his Lordship quoted with approval a passage from the judgment of Hilbery J in *Eastern Counties Building Society v Russell* to the following effect:

> Rather will the court in case of doubt, lean in his favour. Neither equity nor law will put a construction on the document which results in imposing on the surety any more than, on the strictest construction of the instrument, he must be said expressly to have undertaken, or so as to detract from the right given to the surety by the proviso defining the circumstances in which the surety is to be held discharged.

Put differently, the second approach propounded by Sheppard J in *Scholefield Goodman and Sons Ltd v Gange* is known as the contra proferentum approach, and its importance has grown through the years. The third approach is by taking the guarantee as a mercantile document or commercial contract and this seems to be the brunt of the argument of Miss Amy Law Siew Tin, learned counsel for the appellant. On the authorities of *James v Mason* and *International Leasing Corp (Vic) Ltd v Aiken* (1967) 2 NSWR 427, the guarantee has to be given a reasonable business meaning and it should not be construed in such a way as to render the guarantee ineffective or illusory.

Examples of recourse agreements in other jurisdictions are abound, but for this exercise I need refer to only two authorities. The first would be the Court of Appeal case of *Bowmaker (Commercial) Ltd v Smith* [1965] 2 All ER 304 at p 305; [1965] 1 WLR 855 at p 856 where the recourse agreement was worded thus:

1 In consideration of your entering into hire purchase agreements with customers introduced by us we agree to indemnify you against any loss suffered by reason of the fact that: the hirers do not pay for any cause whatsoever the amounts which they would if they completed the agreement by exercising the option to purchase.

2 On payment by us to you of the loss we shall be entitled to your rights in respect of: (a) the hirer; (b) any indemnifier or guarantor; (c) the goods.

3 'Loss' shall mean the difference between the total amount which the hirer would have had to pay in order to acquire title to the goods under the hire purchase agreement plus your expenses less payments received by you. The date of loss shall be any date you notify us after termination of the hire purchase agreement or hiring.

4 When an indemnity is given to you by any other person this our indemnity shall not be a joint indemnity but an indemnity against default of that indemnifier.

5 Each hire purchase agreement shall be treated as a separate transaction for the purpose of this indemnity and settled accordingly.

6 It is further hereby agreed that no time or indulgence shown by you to the hirer or any indemnifier or guarantor shall in any way affect this indemnity.

The finance company in *Bowmaker (Commercial) Ltd v Smith* claimed against the dealer to recover the loss due under the indemnity agreement. The dealer contended that transfer by the finance company of the vehicle to him was a condition precedent to his liability to pay under the indemnity agreement. The trial judge held that the finance company's failure to transfer the vehicle was a breach of its obligations under the indemnity agreement, but not such a breach as went to the root of the contract, and he, accordingly, deducted £55, the value of the vehicle, as damages for that breach from the amount claimed by the finance company, and gave judgment for the company for the balance of £140 1s 6d. On appeal to the Court of Appeal (Sellers LJ, Diplock LJ and Russell LJ), in dismissing the appeal, it was held, inter alia, that although the obligation of the finance company under this indemnity agreement to transfer the vehicle to the dealer was a term of the contract, breach of that term ordinarily did not entitle the dealer to repudiate the contract but only to claim damages equal to the value of the vehicle, accordingly, the finance company was entitled to the sum awarded by the trial judge.

The second case would also be the Court of Appeal case of *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493 at p 497; [1967] 1 All ER 61 at p 63; [1966] 3 WLR 1280 at p 1283, where the recourse agreement was worded thus:

> In consideration of your entering into a hire-purchase agreement with Raymond Harry Webb ... I agree to indemnify you against any loss you may suffer by reason of the fact that the hirer under the said agreement for any cause whatsoever does not pay the amounts which he would if he completed his agreement by exercising the option to purchase. The date of loss shall be any date you notify me after termination of any of the said agreement or the hiring thereunder. Loss shall mean the difference between the total amount the hirer would have had to pay to acquire title to the goods under the hire-

> purchase agreement, plus your expenses, less payments received by you. If an indemnity is also given to you by any other person, my indemnity shall not be a joint indemnity but an indemnity against default of that indemnifier. On payment by me to you of the loss, I shall be entitled to your rights in respect of the hirer, the goods and any other indemnifier or guarantor. No time or indulgence shown by you to the hirer or any indemnifier or guarantor shall in any way affect this indemnity.

Lord Denning MR, who delivered a separate judgment and whose judgment received the concurrence of the other two panel members of the Court of Appeal (Danckwerts LJ and Diplock LJ), had this to say:

> On the face of it, the defendant, who has had £400 for the car, is saying to the plaintiff:
>
> > 'If you let the hirer have this car, I will make sure that it is purchased at the hire-purchase price. If he defaults, I will indemnify you against any deficiency on that price on the understanding, of course, that I shall in return get the car and all your rights.'
>
> That seems to me a very reasonable and sensible agreement. I have no doubt that it is an indemnity and not a guarantee.

As can be seen, both *Bowmaker (Commercial) Ltd v Smith* and *Goulston Discount Co Ltd v Clark* relate to recourse agreements in the nature of an indemnity. It is appropriate, at this juncture, to set out the distinction between a contract of guarantee and a contract of indemnity. In essence, a guarantee is the promise of one person to be answerable for the debt or obligations of another if that other defaults (see *Moschi v LEP Air Services Ltd* [1973] AC 331; [1972] 2 All ER 393; [1972] 2 WLR 1175). It is said that a contract of guarantee is predicated upon the existence of a principal obligation owed by the principal debtor (see *Morin v Hammond Lumber Co* (1923) 1 DLR 519) to the creditor and the person who makes the promise is called the guarantor. Thus, a valid guarantee depends upon the existence of a promise made by the guarantor to the creditor to whom the principal debtor is already answerable or is to become answerable (per Vaughan Williams LJ in *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at p 784). I can do no better than to cite *Jowitt v Callaghan* (1938) 38 SR (NSW) 512 where Jordan CJ in trenchant terms described the general nature of a contract of guarantee in the following words:

> The contract of guarantee or suretyship is a contract between two persons which is intended by them to secure the performance of the obligation of a third person to one of them. The existence, present or future, of the obligation of a third person, and an intention in the parties to the contract to secure the performance of that obligation, are essential features of a contract of guarantee. If these elements are present, the contract is one of guarantee whether the promise be collateral to the promise of a principal obligor and in the nature of a distinct and separate promise to perform the principal obligation if it does not: *Inland Revenue Commissioners v Holder* [1931] 2 KB 81 at pp 101–102; *Elder v Northcott* [1930] 2 Ch 422 at p 430; or whether it be a joint promise with the principal obligor by virtue of which an immediate obligation is assumed to the obligee which is joint with that of the principal obligor: *Permanent Trustee Co of NSW Ltd v Hinks* 34 SR

130 (in which case, there is suretyship in equity though not at common law: *Wauthier v Wilson* 28 TLR 239); and whether the promise be a promise to be personally liable if the principal obligor does not perform the obligation, or a promise merely that certain property of the promisor shall be a security for the performance of the principal obligation: *Re Conley, ex p The Trustee v Barclay's Bank Ltd* [1938] 2 All ER 127.

Whereas the contract of indemnity is said to be 'a contract by one party to keep the other harmless against loss' (*Yeoman Credit Ltd v Latter* [1961] 2 All ER 294; [1961] 1 WLR 828 at pp 830–831), and is not dependent on the continuing liability of the principal debtor. Be that as it may, in the final analysis, it is the court that will be called upon to decide whether the contract is one of indemnity or that of a contract of guarantee. But what is germane to remember is this: where the words 'guarantee' or 'indemnity' appear in the agreement, these are indications of the intentions of the parties, especially so if the expressions are repeated a number of times, over and over again (*Heald v O'Connor* [1971] 2 All ER 1105; [1971] 1 WLR 497 at p 503), or those expressions appear in the headings of the agreements (*Goulston Discount Ltd v Clark*).

Now, the crucial question to ask is this: under what category would the agreement in the present appeal fall? The answer lies in the agreement itself and for convenience, it is reproduced below in verbatim:

Guarantee of hire-purchase agreement

To:

Hong Leong Finance Bhd,
3rd Floor, Bangunan Hong Leong,
117, Jalan Tun HS Lee,
50000 Kuala Lumpur.

1 In consideration of your entering at my/our request into a hire-purchase agreement No 130110/0091/172999 proposed to be made between yourselves and Thamilchelevan s/o Palinesamy of 04-35 Blk B, Jalan Camar 14, Taman Perling, 81200 Johor Bahru ('the hirer') I/we, the undersigned hereby jointly and severally guarantee upon written demand being made to me/us by you the due and punctual payment of all sums which may become due to you under to arising out of the said hire purchase agreement and the due performance and observance by the hirer of each and every term and condition in the said hire purchase agreement to be performed and observed by the hirer.

2 I/we agree and declare that my/our liability under this guarantee shall not in anyway be discharged diminished or affected by the invalidity or unenforceability of the said hire purchase agreement or —

(a) by reason of any assignment by the hirer of the hirer's right title and interest in pursuance of the Hire-Purchase Act 1967 (Rev 1978);

(b) by the granting of time or indulgence to the hirer;

(c) by the effecting of any release of or compromise with the hirer or any agreement not to sue the hirer;

(d) by the impairment of any security taken from the hirer or the failure to realise or enforce such security; and

(e) by the variation of any term or terms of the hire purchase agreement but so that I/we shall not be liable by reason of such variation for payment of any sum greater than the total amount for which I/we would have been liable if such variation had not been made.

3 I/we will jointly and severally on written demand indemnify you against all loss or damage you may sustain under the said hire-purchase agreement whether or not such loss or damage results from the commission of any breach by the hirer and whether or not you have any legal right to claim against the hirer for such loss or damage or have availed yourself of your legal remedies against the hirer or the goods comprised in the said hire-purchase agreement.

4 I/we further agree as between me/us and yourself I/we shall be deemed to be the principal debtor and I/we waive all suretyship and other rights inconsistent with this clause.

5 I/we further agree that a certificate signed by any of your authorized officers stating the amount owing hereunder shall be prima facie evidence of that fact.

6 I/we further agree that my/our obligations hereunder shall be binding on my/our personal representation and that any demand made by you hereunder shall be validly made if served on me/us personally or sent to me/us by prepaid ordinary post to or left at my/our address stated below or to or at my/our current business or private address or that last known to you and if sent by post shall be conclusively deemed to have been received by me/us within 48 hours after the time of posting.

7 No changes whatsoever in the constitution of the hirer being a partnership firm or in the event of the hirer being a sole-proprietorship becoming a partnership shall impair or discharge my/our liability under this guarantee notwithstanding s 20 of the Partnership Act 1950 or any other statute.

This guarantee shall be binding on me/us notwithstanding any changes that shall subsequently take place in the constitution of your company or the hirer being a company registered under the Companies Act 1965 (whether by amalgamation with any persons firms or companies or otherwise) and whether such amalgamation shall or shall not involve the purchase and sale of assets by and to you or the hirer and the formation of a new company to carry on your or the hirer's present or some other business under the present or some other name. In the event of any such amalgamation taking place as aforesaid, this guarantee shall operate as though it had been originally given to such new or amalgamated company and as if my/our liability thereto had commenced at the date of this guarantee.

8 And we hereby acknowledge to have read the said hire-purchase agreement or a copy hereof.

Dated this 26th day of June 1991

Sgd	Sgd
Witness to guarantor's signature	Signature of guarantor
(Other than husband or wife of guarantor)	Full name of guarantor: IBRAHIM BIN MOHD YUSOF (Full name in block letters)

Name: Ng Shin Kwei	I/C No: 1812591
I/C: 5812691	Age: 46 Years
Address:	Address:
8A-C, Jalan Station,	95, Jalan Camar 3,
80000 Johor Bahru.	Taman Perling, 81200 Johor Bahru
	Name and Address of bankers : MBB–JB
Occupation : Senior clerk	Occupation: Sales executive.

Several observations must be made in regard to the agreement. The heading of the agreement clearly shows that the guarantee of the hire-purchase agreement is in the nature of a guarantee, and that guarantee was by a dealer. The expression 'guarantee' appears on at least four occasions apart from that appearing at the heading of the agreement. The agreement sets out the obligations of the dealer as a guarantor to the appellant in the event of default by Thamil. In my judgment, it is a guarantee agreement and not an indemnity and since the dealer was cited as a guarantor to the hire-purchase agreement, it clearly runs counter to the Act. As a dealer, the second respondent is barred from entering into a contract of guarantee with the appellant, and this seems to be the very essence of the agreement entered between the appellant and the dealer. That which is not allowed by law will consequently be held to be null and void and of no effect. The usage of the word 'indemnify' that appears in cl 3 of the 'guarantee of hire-purchase agreement' in solitary form cannot convert the guarantee by the dealer into an indemnity. No matter how one approaches the 'guarantee of hire-purchase agreement' in its present form and text, one will still construe it as a guarantee and not an indemnity. I am asked by Miss Amy Law Siew Tin to allow the appeal as there was nothing on the pleadings to allege that the contract of guarantee between the dealer and the appellant could not be enforced for want of illegality, fraud and misrepresentation. It is undeniable that a contract of guarantee, like any other contract, can be nullified on a variety of grounds ranging from incapacity to duress and undue influence, from misrepresentation to illegality. But all these grounds must be pleaded, and if not pleaded, it will not be raised nor argued. These grounds were not pleaded at all by the second respondent, and in fact Mr Liew Yoon Sam, learned counsel for the second respondent, did not rely on any of these grounds to bring home the message that the guarantee agreement must be viewed in perspective by this court in order to arrive at a just decision.

The indemnity contracts in both *Bowmaker (Commercial) Ltd v Smith* and *Goulston Discount Co Ltd v Clark* conferred rights and obligations to the dealers there, whereas here, the contract of guarantee imposes an obligation without any right to the dealer at all. At first blush, though the contract of guarantee here appears to be harsh, yet it is perfectly in order as it comes squarely within what Jordan CJ said in *Jowitt v Callaghan*. But what is of utmost importance here is whether the contract of guarantee entered under the Act can be enforced against the dealer. As the law now stands, a contract of guarantee by the dealer to the appellant cannot be enforced by this court for the simple reason that it contravenes the Act. This decision would certainly cause hardship to the appellant, and this

court cannot relax the law to give business efficacy to the contract of guarantee entered between the dealer and the appellant. Someone other than the dealer who is not engaged in the trade or business of selling Mercedes Benz should have signed this contract of guarantee and if that happens, perhaps, this court may give effect to it. Alternatively, to circumvent the Act, the contract between the dealer and the appellant should be in the nature of an indemnity employing the same words or words to the like effect as reflected in *Bowmaker (Commercial) Ltd v Smith* and *Goulston Discount Co Ltd v Clark*. Here, it is not a case of the dealer obtaining the Mercedes Benz from a supplier under an agreement to pay for the Mercedes Benz by instalment with the intention of selling the Mercedes Benz to Thamil where such an agreement would be outside the purview of the Act. Here, it was agreed that the dealer acted as a sales executive with Cycle & Carriage and the Mercedes Benz from Cycle & Carriage was sold to Thamil on hire purchase provided by the appellant, and the dealer acted as a guarantor under the hire-purchase agreement and for that reason it offended against the Act. Put differently, the guarantee agreement in its present form, is a worthless piece of paper that cannot be enforced in a court of law. Now, even if there is an ambiguity in the terms of the contract of guarantee here, on the principle of contra proferentum it should be read favourably to the advantage of the dealer guarantor. As Cohen LJ said in *Midland Counties Motor Finance Co LD v Slade* [1951] 1 KB 346; [1950] 2 All ER 821:

> I would add that, if I were still in doubt, the maxim that an instrument should be construed contra proferentum would lead me to the same conclusion.

For the foregoing reasons, I confirmed the decision of the learned judge of the sessions court in Johore Bahru, and dismiss the appeal forthwith with costs.

Appeal dismissed.

Reported by Angela Ho